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No. 94-1242

In The

Supreme Court of the United States

October Term, 1994

KNIGHTS OF COLUMBUS COUNCIL NO. 2961, and DONALD L. CREATORE,

Petitioners,

vs.

THE TOWN OF TRUMBULL, CONNECTICUT and DAVID A. WILSON, TRUMBULL FIRST SELECTMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF

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QUESTION PRESENTED

Whether the Establishment Clause permits the display of a privately-sponsored, solitary, unattended religious symbol in a traditional public forum that is open to unattended non-religious symbols, when the forum is closely adjacent to a core government building.

STATEMENT OF THE CASE

The Statement of the Case in the Petition for a Writ of Certiorari is correct as to all facts that it contains. However, it omits two relevant district court findings: that the Trumbull Town Green adjoins the Trumbull Town Hall, a seat of government (Pet. App. 3A #3; 4A #10; 8A #17); and that before this lawsuit began, Town officials adopted a policy that bars the display of any solitary unattended religious symbols on the property (Pet. App. 5a #16).

RESPONDENTS' REASONS FOR NOT OPPOSING THE PETITION

This Court has granted certiorari in *Capitol Square Review and Advisory Board v. Pinette,* No. 94-780, in order to resolve what is in essence the same issue as the one at bar. But *Capitol Square's* facts create a very real possibility that the Court will decide that case without reaching this issue.

This Court, for instance, could find sufficient evidence of political viewpoint discrimination against *Capitol Square's* Ku Klux Klan plaintiffs to decide the case on that basis alone, either by affirming the Sixth Circuit's judgment (but not that court's reasoning), or by remanding for further fact-finding on the viewpoint discrimination question. *See* Petition for a Writ of Certiorari, No. 94-780, at 12-13. No such question arises in *Knights of Columbus.*

Alternatively, this Court could decide *Capitol Square* on the ground that the Petitioners in that case discriminated between different speakers within the same genre, *i.e.,* religious speech, because they allowed the display of an unattended menorah. *See Pinette v. Capitol Square Review and Advisory Board,* 30 F.3d 675, 676 (6th Cir. 1994). By so doing, the Court would leave for

another day the question of whether the genre as a whole enjoys Speech Clause protection under the circumstances. *Cf. Lamb's Chapel v. Center Moriches Union Free School District*, 509 U.S. ___, 113 S. Ct. 2141, 2146-47 (1993). This possibility, too, does not arise in *Knights of Columbus*. Though the Town had allowed a religious speaker to display a menorah on its Town Green during past holiday seasons, the district court found that the Town adopted a policy, prohibiting the display of all solitary unattended religious symbols on the property, before this litigation began (Pet. App. 5A#16).

Finally, this Court could base its decision on the fact that *Capitol Square's* religious symbol — a cross — is not a seasonal one, but rather is the principal, most familiar, and most powerful symbol of the Christian faith. If the Court decides the case on this basis, it might leave to another day the question of whether a more seasonal religious symbol is different. The *Knights of Columbus* display, in contrast, is a creche. The Town denies that a sacred religious object, such as a creche, can ever truly be "seasonal" in the same sense, for instance, as a Christmas tree. But at least a creche bears a closer relationship to the season than a cross does.

If this Court does base its *Capitol Square* decision on one or more of the above-mentioned grounds, the Town of Trumbull (in common with other communities across the country) will continue to face the same annual dilemma that it faced last December. If it denies a permit to a religious speaker who wishes to display a solitary, unattended religious symbol on its Town Green, the speaker will sue the Town. If it grants the permit, the Town's separationists will sue the Town, as some threatened to do this past year. Trumbull and other communities can escape from this annual dilemma only if this Court definitively resolves *Capitol Square's* certified issue — and *Knights of Columbus*, if accepted, is far likelier than *Capitol Square* to actually do so.

The Town would not have this Court suppose that it seeks only a resolution, and is indifferent to the outcome. On the contrary, the Town firmly believes that its present policy of banning all solitary, unattended religious symbols from its Town Green is correct, and that the lower court decisions sustaining that policy are likewise correct. Such symbols, in the Town's judgment, have no place on public property abutting a core government building, because thus situated they send non-adherents a daunting exclusionary message — a message which none of the Town's citizens should have to endure. The Town argued this position vigorously in the *amicus curiae* brief which it submitted in *Capitol Square,* and is prepared to do so again on plenary review.[1]

The Town also believes, however, that it has another obligation to its citizens, which is to spare them, in future holiday seasons, the expense and divisiveness that this sort of controversy inevitably engenders. Accordingly, the Town cannot in conscience resist Petitioners' efforts to obtain, from this Court, what both sides hope will be a definitive ruling. The Town, in consequence, does not oppose, and indeed supports, the certiorari petition.

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1. The Connecticut Civil Liberties Union Foundation, a state affiliate of the American Civil Liberties Union, co-signed that *amicus* brief.

CONCLUSION

The Town agrees with the Petitioners that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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